

STAFF REPORT

**ADMINISTRATIVE CIVIL LIABILITY ORDER
FOR
CRV ENTERPRISES, INC.
GOLD CREEK ESTATES
CALAVERAS COUNTY**

INTRODUCTION

CRV Enterprises, Inc. (hereafter the Discharger) is the owner and developer of an approximately 80-acre commercial construction project known as Gold Creek Estates. The project is on the east side of Highway 26, one mile south of Valley Springs in Calaveras County. The site is being developed into residential homes. Storm water runoff from the site discharges to Cosgrove Creek, a tributary of the Calaveras River.

Regional Board staff noted violations of the General Storm Water Permit at the Gold Creek Estates in January, February and March of 2005. After Regional Board staff issued two Notices of Violation, the Executive Officer issued an Administrative Civil Liability Complaint proposing the Discharger pay \$150,000 to the State's Cleanup and Abatement Account.

SITE DESCRIPTION

During the inspections in early 2005, the Gold Creek Estates could be divided into two portions: an upper and a lower area based on the level of infrastructure completed at that time. The following is a description of the site in early 2005. In the lower area of the project, paved roadways had been constructed, with the standard curb, gutter and storm drain system. Pads were completed along the paved roadways, and production homes were under construction on many of the lots. In one section of the lower portion of the project, a relatively large wetland area was observed. Fill material from the back of the lots appeared to have extended into the un-fenced wetland area. On the upper portion of the development, wet utilities had been installed including a storm drain system; however, the roadways had not been cut to grade. A large section of the upper portion of the project sloped toward the production areas on the lower half of the project. The remainder of the upper portion of the project either sloped toward a large detention basin or toward a small intermittent tributary to Cosgrove Creek, which flowed along the back of the upper portion of the project. The large detention basin discharged directly into the storm drain system, which flows from the upper portion of Gold Creek Estates down through the neighboring Reynen and Bardis subdivision and outfalls directly into Cosgrove Creek, a tributary of the Calaveras River.

HISTORICAL OVERVIEW

On 16 November 1990, the State Water Resources Control Board adopted National Pollutant Discharge Elimination System (NPDES) Permit (General Permit) for Storm Water Discharges Associated with Construction Activities. This permit was updated on 19 August 1999, and the current General Permit is WDR Order No. 99-08-DWQ. Dischargers with construction projects that disturb one acre or more must submit a Notice of Intent (NOI) and comply with the General Permit.

The General Permit requires that the Discharger implement Best Available Technology Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT) to reduce or eliminate storm water pollution. The General Permit authorizes the discharge of storm water to surface waters from the construction site, but it prohibits the discharge of materials other than storm water. The effluent limitations contained in the General Permit are narrative and include the requirement to implement appropriate Best Management Practices (BMPs). The BMPs must primarily emphasize source controls such as erosion control and pollution prevention methods. The Discharger must install structural controls, as needed, such as sediment basins and chemical treatment systems, which constitute BAT and BCT and will achieve compliance with water quality standards.

The General Permit requires the Discharger to prepare a Storm Water Pollution Prevention Plan (SWPPP). SWPPP requirements emphasize the use of appropriately selected, correctly installed and maintained pollution reduction BMPs. The SWPPP has two major objectives: (1) to help identify the sources of sediment and other pollutants that affect the quality of storm water discharges, and (2) to describe and ensure the implementation of BMPs to reduce or eliminate sediment and other pollutants in storm water as well as non-storm water discharges.

The Discharger filed a Notice of Intent (NOI) to comply with the General Permit in May 2003 (WDID No.5S05C321339). According to the NOI, the project was scheduled for completion by December 2003.

COMPLIANCE

The following is a chronology of compliance issues at the Gold Creek Estates site.

An inspection on 13 January 2005 found serious violations of the General Permit. These violations included:

- Evidence of discharge of sediment to the storm drain system – Sediment laden storm water was found ponded around a drain inlet, indicating that during the previous rainstorm there was a discharge of sediment laden water. Further evidence of a discharge was demonstrated at other drain inlets where most of a street was covered with sediment. Some sediment laden water was still discharging to the storm drain system at the time of the inspection.
- Failure to implement an effective combination of erosion and sediment control BMPs – Sediment control BMPs were poorly maintained and likely contributed to the discharge of sediment to the storm drain system. Sediment control was limited to a few fiber rolls installed behind the curb, rock bags or fiber rolls adjacent to the drain inlets, and drain inlet filter bags in the drain inlets. These poorly maintained fiber rolls behind the curb were likely overtopped and would have been largely ineffective during previous rain events. No erosion control BMPs were found onsite during the inspection.
- Non-storm water was discharging to the storm water collection system – Non-storm water, as indicated by a stream of white to grey liquid, was discharging to a drain

inlet. This flow was distinct from the turbid storm water runoff. A bottle of Mapelastic was found nearby and was suspected to be the cause of this discharge. Mapelastic is a waterproofing and crack isolation membrane material. According to the bottle, the product is a potential skin and eye irritant and harmful or fatal if swallowed.

- Sediment was discharged to a wetland preservation area – A wetland area in the center of the project was not protected, and as a result, sediment was discharged to the wetland area. No signs, fencing or other warnings were present to aid contractors to avoid discharge to the wetland areas during site grading work.
- A concrete washout area was poorly constructed and maintained – Concrete washouts are an important BMP for the temporary disposal of concrete washwater and to keep this material out of surface waters. The washout area was in very poor condition at the time of inspection. Fiber rolls were not maintained, the washout access was very muddy and plastic sheeting was in disrepair.

On 21 January 2005, Regional Board staff issued a Notice of Violation based on the violations observed during the 13 January inspection. The Discharger responded in writing that four acres were hydroseeded, all drain inlets were cleaned, decomposed or damaged straw wattles had been replaced, and the SWPPP was being revised and updated. The Discharger did not submit a revised SWPPP BMP map or evidence of SWPPP training as requested by the NOV.

On 27 January the site was inspected to determine if effective BMPs had been added and to assist Calaveras County in assessing the status of the site. The inspection found that BMPs had been added throughout the lower portion of the site, and that drain inlets had been cleaned; however, the SWPPP was still not complete.

On 16 February the site was inspected during a rain event to evaluate compliance with the General Permit. At this time, a significant number of storm water management problems were found on the upper portion of the project. These problems included:

- A discharge of sediment laden storm water was found entering the storm drain system – Sediment laden storm water was found flowing from the sediment basin directly into the storm drain system. The outfall structure of the sediment basin was poorly protected, and no riser pipe or other flow control structure was installed at the outlet of the basin. A short distance from the outfall area of the detention basin a break in the storm drain system was identified, and sediment laden storm water was also entering the storm drain system at this location. In other areas, sediment laden storm water was ponding, and evidence of sheet erosion was found throughout the upper portion of the project.
- Failure to implement an effective combination of erosion and sediment control - BMPs for the prevention of erosion were not present. Erosion control on a neighboring property demonstrated the feasibility and effectiveness of erosion control BMPs. Photographs show a dramatic difference between the Reynen and

Bardis site which had straw mulch spread and the CRV site which lacked erosion control.

- Failure to protect an intermittent stream crossing – No effort was made to install a culvert so that an earthen stream crossing would not impact streamflow. Sediment is shown in photographs of the streambed.
- Erosion on the lower portion of the site resulted in a large rill or gully.

A second Notice of Violation was issued on 23 February 2005. The Discharger responded that they consulted with the project engineer and made changes to the SWPPP to more accurately reflect the BMPs that were in place. The Discharger also stated that they had protected all areas that showed evidence of channeling, installed a riser pipe in the detention pond, installed additional wattles and check dams where needed. The Discharger also indicated that they would monitor the water level in the detention basin and treat it with flocculent prior to discharge to the overflow pipe. The Discharger failed to submit a revised SWPPP BMP map showing the BMPs installed on the site as requested by the second NOV.

On 16 March 2005, Calaveras County Public Works issued a Cessation of Public Works Activities letter for the Gold Creek Estates.

On 19 March 2005, Regional Board staff inspected the site just prior to a significant rain event and found continued violations as follows:

- A significant amount of sediment was found on the roadways
- Many BMPs were ineffective at retaining sediment and required maintenance or repair.
- Poor housekeeping practices were observed including very poor condition of the concrete washout area.
- Observed sediment discharge to the storm drain system
- Lack of an effective combination of erosion and sediment control on the upper portion of the site.

In July 2005, U.S. EPA fined CRV Enterprises \$47,500 and required them to preserve an additional 14 acres of wetlands for the illegal fill of wetlands on the lower portion of the Gold Creek Estates project.

REGULATORY FRAMEWORK AND LEGAL BASIS FOR ACTION

As stated above, the General Permit implements the National Pollutant Discharge Elimination System (NPDES) for storm water discharges associated with construction activities that result in the disturbance of one or more acres.

The Discharger is in violation of the General Permit as follows:

1. Failure to implement erosion and sediment controls on all disturbed areas during the rainy season is a violation of Section A.6 Storm Water Pollution Prevention Plan. Erosion Control, which states in part: *“At a minimum, the discharger/operator must implement an effective combination of erosion and sediment control on all disturbed areas during the rainy season.”*

An inadequate combination of erosion and sediment controls was observed by Regional Board staff on 13 January 2005, 16 February 2005 and 19 March 2005, all dates within the rainy season. Erosion control BMPs on the site were very limited, and the sediment control BMPs were limited and poorly maintained. The combination of the erosion and sediment control BMPs were not effective in protecting water quality.

2. Failure to develop and implement an adequate Storm Water Pollution Prevention Plan (SWPPP) is a violation of Special Provisions of Construction Activity C.2 which states: *“All dischargers shall develop and implement a SWPPP in accordance with Section A: SWPPP. The discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the BAT/BCT performance standard.”*

The Discharger failed to adequately develop and implement a SWPPP to meet the BAT/BCT standard required by the General Permit. The Discharger failed to install adequate BMPs and failed to maintain the BMPs that were installed. There was a significant problem associated with good housekeeping at the Gold Creek Estates site, leading to sediment and non-storm water discharges. These problems stem from the Discharger's failure to develop and implement an adequate SWPPP. The Discharger had not developed an adequate SWPPP even after Regional Board staff issued two Notices of Violations with requests for updated SWPPP BMP maps.

3. Discharge of pollutants to waters of the State is a violation of Discharge Prohibition A.3 which states, *“Storm water discharges shall not cause or threaten to cause pollution, contamination, or nuisance.”*

The discharge of pollutants on 13 January 2005 and 16 February 2005 caused or threatened to cause pollution, contamination, or nuisance. Regional Board staff observed sediment laden stormwater as well as traces of other non-storm water pollutants discharged to the storm drain system.

ADMINISTRATIVE CIVIL LIABILITY ORDER

Enforcement Considerations

Because of these violations of the General Permit, the Regional Board may impose an ACL pursuant to Section 13385 of the California Water Code (CWC). Section 13385 of the California Water Code states, in part:

“(a) Any person who violates any of the following shall be liable civilly in accordance with this section:

(1) *Section 13375 or 13376*

(2) *Any waste discharge requirements or dredged and fill material permit.*

(5) *Any requirements of Sections 301, 302, 306, 307, 308, 318, or 405 of the Federal Water Pollution Control Act as amended."*

"(c) *Civil liability may be imposed administratively by the State Board or a Regional Board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the... following:*

(1) *Ten thousand dollars (\$10,000) for each day in which the violation occurs.*

"(e) *In determining the amount of liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent, and gravity of the violation, or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefits or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation."*

The amount of the liability was established based upon a review of the factors cited in CWC section 13385 and the State Water Resources Control Board (State Water Board) Water Quality Enforcement Policy. The following factors were used to establish the amount of the liability:

Nature and Circumstances

During inspections in early 2005, Regional Board staff observed significant violations of the General Permit at the Gold Creek Estates site on 13 January, noted improvements on 27 January but noted significant violations again on 16 February and 19 March. The Discharger failed to come into compliance with the General Permit although staff conducted a number of inspections and issued two Notices of Violation. Staff made numerous attempts to work with the on-site contact on potential corrective actions but was unable to get consistent implementation and maintenance of storm water BMPs. The Discharger also did not adequately implement the project in accordance with the General Permit. The Discharger failed to protect the storm water drainage system resulting in a more direct path to surface waters for suspended sediment. This inadequate storm water management implementation added to the problems and should have been addressed in the development and implementation of the SWPPP.

The specific violations of the General Permit include the following:

- the failure to implement an effective combination of erosion and sediment control on all disturbed areas during the wet season,

- failure to develop and implement a SWPPP in accordance with the General Permit and comply with BAT/BCT performance standard,
- failure to comply with Discharge Prohibition A.3 which prohibits storm water discharges from causing or threatening to cause pollution, contamination or nuisance.

Since Regional Board staff did not observe significant improvements to storm water BMPs at the Gold Creek Estates site from 16 February to 19 March, the Discharger was in violation of the General Permit during that period of time.

The staff person working on this site is the Regional Board's storm water construction coordinator and has inspected over a thousand construction sites in his career. The Gold Creek Estates property is one of most significant problem sites in the 7 counties under his jurisdiction.

Extent and Gravity

This site was in violation of the General Permit for much of early 2005. Staff made a number of attempts to work with the Discharger to bring the site into compliance. The violations include inadequate storm water BMPs and the discharge of sediment and other pollutants into the storm drain system and Cosgrove Creek.

Susceptibility of the Discharge to Cleanup and Abatement

Cosgrove Creek is a fast moving creek; therefore, once sediment and other pollutants enter the creek, they would not be readily susceptible to cleanup. The sediment would likely settle in various downstream areas, and positively matching the downstream sediment deposits with the Gold Creek Estates discharges would be difficult.

Degree of Toxicity of the Discharge

The discharges likely added suspended matter to the creek, which has the ability to impair respiration by organisms that depend on gills to obtain oxygen from the water column. The discharges also likely added silt and sediment to the streambed, which may have changed the benthic condition of the stream. However, no aquatic bio-assessment of the stream has been completed.

Ability to Pay

CRV Enterprises, Inc. is an established developer in good financial standing. As such, the monetary penalties associated with this administrative civil liability should pose no financial hardship for the Discharger nor reduce their ability to continue in business.

Prior History of Violations

On 16 March 2005, Calaveras County Public Works issued a Cessation of Public Works Activities letter. In July 2005, U.S. EPA fined the Discharger \$47,500 for illegal fill of wetlands and required additional wetlands mitigation.

The Discharger also owns another development, Olive Orchard, in Calaveras County. An inspection of that site identified significant storm water management issues and as a result, a Notice of Noncompliance was issued.

Degree of Culpability

The Discharger filed a Notice of Intent for coverage under the General Permit, and prepared a Storm Water Pollution Prevention Plan, thus demonstrating awareness on its part of permit requirements and prohibitions. Regional Board staff has conducted a number of inspections of sites owned by the Discharger and have issued notices notifying the Discharger of the violations. Staff has also discussed the violations with the Discharger and his representatives.

Economic Benefit or Savings Resulting from the Violation

The Discharger installed some sediment control BMPs on the lower portion of construction site but did not maintain and replace those BMPs as needed. The Discharger did not install erosion control BMPs on the lower portion of the project in accordance with the General Permit. No effective erosion or sediment control BMPs were found on the upper portion of the project until the 19 March inspection.

The estimated economic benefit of the violations is calculated based on a conservative cost of \$2,000 per acre to provide for adequate erosion and sediment control and to update the SWPPP and to train contractors and subcontractors on storm water management. Using the project acreage provided by Calaveras County staff and estimating that about $\frac{3}{4}$ of the property had been disturbed, the total economic benefit was calculated to be \$120,000.

Other Matters that Justice May Require

Staff costs were estimated to be \$6,400, assuming the ACL was settled without significant negotiations. Staff costs increased an additional \$12,800 preparing for the hearing.

Determination of Amount

In determining the appropriate Administrative Civil Liability to be imposed on the Discharger, the factors in California Water Code Section 13385 were considered. In consideration of the above findings, the Executive Officer, on 1 July 2005, issued an Administrative Civil Liability Complaint in the amount of \$150,000 for violating the General Permit on 13 January 2005 and from 16 February 2005 until 19 March 2005. While the volume of discharge from this site in violation of the General Permit was likely substantial, no liability was proposed for the volume of the discharge.

RECOMMENDATION

In consideration of the above findings, Board staff recommends that the Discharger be assessed the administrative civil liability of \$150,000 for 33 days of violations. No per gallon civil liability is proposed.